

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

3 UNITED STATES OF AMERICA, ) AU:23-CV-00853-DAE  
4 Plaintiff, )  
5 v. ) AUSTIN, TEXAS  
6 GREG ABBOTT, ET AL., )  
7 Defendants. ) AUGUST 7, 2024

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TRANSCRIPT OF STATUS CONFERENCE  
BEFORE THE HONORABLE DAVID A. EZRA  
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24 Proceedings recorded by computerized stenography, transcript  
25 produced by computer.

09:31:53 1 (Open court)

09:31:53 2 THE CLERK: AU:23-CV-853, United States of

09:31:56 3 America v. Abbott, et al.

09:31:58 4 THE COURT: May we have appearances, please.

09:32:02 5 MR. WADE: Good morning, Your Honor. This is

09:32:04 6 Landon Wade with the U.S. Attorney's office for the

09:32:06 7 Western District of Texas on behalf of the United States.

09:32:08 8 THE COURT: Okay. And we do have the other

09:32:10 9 lawyers who are appearing by phone. Can we have their

09:32:13 10 appearances.

09:32:15 11 MR. LYNK: Good morning, Your Honor. This is

09:32:17 12 Brian Lynk. And I believe on the phone with me are

09:32:25 13 Andrew Knudsen, Kimere Kimball, Bryan Harrison, our

09:32:27 14 supervisor Angeline Purdy, and Mary Kruger, also from the

09:32:31 15 U.S. Attorney's office.

09:32:33 16 THE COURT: Okay. Thank you.

09:32:34 17 And can I have for the State of Texas.

09:32:37 18 MR. WALTERS: Good morning, Your Honor.

09:32:39 19 THE COURT: Good morning.

09:32:39 20 MR. WALTERS: Ryan Walters for the defendants.

09:32:43 21 With me are my colleagues Johnathan Stone, Munera

09:32:47 22 Al-Fuhaid, Zach Berg, and Kyle Tebo.

09:32:49 23 THE COURT: Okay. All right. And I had

09:32:53 24 invited, but had not ordered, Ms. Pettit to be here. Is

09:32:57 25 she here today?

09:33:01 1 MR. MAZZARA: Yes, Your Honor. She's here, and  
09:33:01 2 I'm representing her. I'm her counsel, Joseph Mazzara,  
09:33:04 3 for the purposes of this hearing today.

09:33:06 4 THE COURT: Mr. Mazzara, are you licensed here  
09:33:08 5 in the Western District of Texas.

09:33:09 6 MR. MAZZARA: No. But the courtroom deputy  
09:33:12 7 requested that I come before the bar to sit here, just to  
09:33:15 8 make it easy with the microphone.

09:33:17 9 THE COURT: No. I don't have a problem. You  
09:33:19 10 can sit right up here. I have no concern where you're  
09:33:22 11 sitting. I just wanted to know whether you were  
09:33:25 12 licensed. Now, if you're not licensed, technically, you  
09:33:28 13 cannot argue.

09:33:31 14 MR. MAZZARA: Right. Yes, Your Honor. I  
09:33:33 15 understand that. But given the short notice of the  
09:33:34 16 hearing, putting in a *pro hac vice* application didn't  
09:33:40 17 seem to be feasible. But, again, I'm just here on a very  
09:33:44 18 limited capacity.

09:33:45 19 THE COURT: All right. Well, I -- let me --  
09:33:46 20 let me clear any concerns that Ms. Pettit might have. If  
09:33:51 21 I were here for the purpose of sanctioning Ms. Pettit,  
09:34:00 22 the order would have said so. It would have been an  
09:34:03 23 order to show cause why she should not be sanctioned.

09:34:07 24 I am not sanctioning Ms. Pettit. I am not mad  
09:34:11 25 at Ms. Pettit. I am not going to be criticizing

09:34:17 1 Ms. Pettit personally. I am concerned about the filing  
09:34:21 2 that was made, and I'm going to be questioning her about  
09:34:25 3 that filing. But I am not in any way, shape, or form  
09:34:31 4 going to be doing anything to her that she would require  
09:34:38 5 an attorney.

09:34:40 6 MR. MAZZARA: Yes, Your Honor. Except for the  
09:34:42 7 fact that you're going to be questioning her. She's an  
09:34:44 8 attorney for the State, for sure, the second senior most  
09:34:47 9 litigator, in fact, for the State of Texas.

09:34:50 10 THE COURT: Well, I'm very pleased to have her  
09:34:51 11 here.

09:34:52 12 MR. MAZZARA: But he she's not made an  
09:34:54 13 appearance in this case.

09:34:55 14 THE COURT: Well, she did, actually. She filed  
09:34:58 15 this in this case.

09:35:00 16 MR. MAZZARA: But --

09:35:00 17 THE COURT: Yes, sir?

09:35:02 18 MR. MAZZARA: In the appellate court. Yes,  
09:35:03 19 sir.

09:35:04 20 THE COURT: Yes. It doesn't matter. We are  
09:35:06 21 one federal court, sir.

09:35:08 22 MR. MAZZARA: I understand that, Your Honor.  
09:35:10 23 There are two case numbers. But, again, she --

09:35:12 24 THE COURT: Yeah. Well, her filing was  
09:35:15 25 rejected by the Court of Appeals. Did you know that?

09:35:19 1 MR. MAZZARA: Your Honor, I'm representing  
09:35:21 2 Ms. Pettit in this matter.

09:35:22 3 THE COURT: Yes. I'm just asking you: Were  
09:35:24 4 you aware of that?

09:35:25 5 MR. MAZZARA: No, I was not. When was it  
09:35:27 6 rejected, Your Honor?

09:35:28 7 THE COURT: It was rejected yesterday. The  
09:35:29 8 case was closed. You didn't know that it was rejected?  
09:35:35 9 Did the State know it was rejected?

09:35:39 10 MR. STONE: Your Honor, it was unfiled, but we  
09:35:40 11 believe that it was refiled last --

09:35:41 12 MR. WALTERS: It was refiled last night.

09:35:43 13 THE COURT: Oh. Did they refile it?

09:35:44 14 MR. WALTERS: Yes, Your Honor.

09:35:45 15 THE COURT: Okay. Then I'm going to direct  
09:35:47 16 that this transcript be filed, then.

09:35:51 17 MR. MAZZARA: And I believe they circulated it  
09:35:52 18 to the entire *en banc* court as well.

09:35:54 19 THE COURT: Oh, okay. Well, that was not -- I  
09:35:56 20 was not made aware of that. That's fine.

09:35:59 21 So I'd like Ms. Pettit to come forward.

09:36:04 22 MR. MAZZARA: Yes, Your Honor. Just a real  
09:36:06 23 quick question before she does, just for the record.  
09:36:08 24 What -- again, she's not an attorney in the case. Are  
09:36:10 25 you asking her to appear as a witness?

09:36:12 1 THE COURT: I'm not asking her to appear as a  
09:36:14 2 witness. She wrote a letter which addressed my comments  
09:36:17 3 in this court, and I'm trying to find out the basis for  
09:36:22 4 what she said, number one.

09:36:24 5 MR. MAZZARA: Yes, Your Honor.

09:36:25 6 THE COURT: Number --

09:36:25 7 MR. MAZZARA: Sorry.

09:36:26 8 THE COURT: Just a minute, sir. Let the court  
09:36:28 9 finish. I will give you plenty of opportunity.

09:36:30 10 Number one. I want to make sure that -- as I  
09:36:36 11 thought when I left the bench yesterday, we were on even  
09:36:41 12 keel here and knew where we were going with this case.  
09:36:43 13 And then this thing comes flying in which raised some  
09:36:47 14 concern to me. So I need to address it so that I am  
09:36:53 15 absolutely sure that going forward we are on the same  
09:36:57 16 path. And that has, sir, nothing to do with you. That  
09:37:02 17 has to do with the gentlemen who represent the State of  
09:37:04 18 Texas.

09:37:05 19 MR. WALTERS: Your Honor, in that light, we --  
09:37:08 20 I'm sure the Court understands that we -- no one here  
09:37:11 21 will be able to talk about any of the internal  
09:37:14 22 deliberations within the Attorney General's Office or  
09:37:17 23 with our clients about the motivation or decisions to  
09:37:20 24 file this letter to the Fifth Circuit.

09:37:26 25 THE COURT: I have no concern about that. I'm

09:37:27 1 not asking anybody about internal deliberations in the  
09:37:30 2 Attorney General's Office. That is not my purpose here.

09:37:39 3 MR. MAZZARA: So, Your Honor, again, just for  
09:37:42 4 Ms. Pettit, I mean, any questions regarding the letter  
09:37:45 5 would be -- would fall under any number of privileges.

09:37:48 6 THE COURT: No, it doesn't. It's publicly  
09:37:50 7 filed.

09:37:50 8 MR. MAZZARA: Not the letter. It's not the  
09:37:52 9 words, the text of the letter itself, but any mental  
09:37:56 10 impressions she had or any thought she had that went  
09:37:57 11 into --

09:37:58 12 THE COURT: I have every right and obligation  
09:38:00 13 to address the matters that are in the letter, so you may  
09:38:04 14 be seated, sir.

09:38:07 15 Now, Ms. Pettit, you were -- this is your  
09:38:10 16 letter? You wrote the letter?

09:38:12 17 MS. PETTIT: Yes, sir.

09:38:12 18 THE COURT: But you weren't here yesterday?

09:38:14 19 MS. PETTIT: No, Your Honor. As I noted in the  
09:38:15 20 letter, I was not present.

09:38:17 21 THE COURT: Right. Now, you filed this under  
09:38:19 22 Rule 28(j). You had this filed. It says: Pursuant to  
09:38:27 23 Rule 28(j), counsel notified the Court of developments  
09:38:31 24 during today's status conference in which the court may  
09:38:34 25 wish to be aware before it issues its forthcoming

09:38:38 1 mandate.

09:38:41 2 MS. PETTIT: Yes, Your Honor.

09:38:41 3 THE COURT: That case is essentially closed,

09:38:43 4 but all right. Let's talk about whether this is a Rule

09:38:46 5 28(j) letter, all right?

09:38:48 6 MS. PETTIT: Your Honor, that is the nature of  
09:38:50 7 the refilling. The Court asked us to file it simply as a  
09:38:53 8 letter and not pursuant to Rule 28(j), because the  
09:38:55 9 opinion had been issued but not the mandate.

09:38:58 10 THE COURT: Okay. Well, it isn't a Rule --  
09:39:00 11 what is it, then, if -- it's just an attempt to do what.

09:39:06 12 MS. PETTIT: It's an attempt to keep the Court  
09:39:08 13 apprised of developments similar to when this Court  
09:39:11 14 issued a number of advisements. We filed those under  
09:39:14 15 Rule 28(j) as well because there was no way other -- that  
09:39:16 16 we could tell, other than that under the rule --

09:39:18 17 THE COURT: Well, when you initially filed it,  
09:39:20 18 you filed it as Rule 28(j) letter, and it isn't -- as the  
09:39:26 19 Court of Appeals has indicated, it isn't a Rule 28(j)  
09:39:30 20 letter. And the reason it isn't is because it doesn't  
09:39:33 21 address any of the issues, whatsoever, that are before me  
09:39:41 22 for the purposes of the hearing I had yesterday.

09:39:46 23 MS. PETTIT: Your Honor, it apprised the Fifth  
09:39:47 24 Circuit of the hearing yesterday, which has been at issue  
09:39:50 25 in a number of prior letters that we filed. And we were

09:39:53 1 simply keeping the Court apprised.

09:39:55 2 THE COURT: It has nothing to do with what we  
09:39:57 3 were doing yesterday. What we were doing yesterday was  
09:40:00 4 going forward pursuant to the Fifth Circuit's ruling.  
09:40:12 5 And the only issue that is now pending before the Fifth  
09:40:16 6 Circuit, pending right now, is the issue of whether the  
09:40:29 7 case is going to be tried to a jury or it's not going to  
09:40:32 8 be tried to a jury. That is the only issue, and that's a  
09:40:37 9 mandamus petition.

09:40:40 10 MS. PETTIT: Respectfully, Your Honor, the  
09:40:41 11 mandate has not issued in the primary case.

09:40:44 12 THE COURT: It doesn't matter whether the  
09:40:45 13 mandate has issued or not.

09:40:47 14 MS. PETTIT: The Court retains jurisdiction  
09:40:49 15 until the mandate does.

09:40:51 16 THE COURT: It doesn't matter. There's no  
09:40:52 17 litigation going on. There is -- the United States  
09:40:56 18 didn't file anything. The State didn't file anything.  
09:41:02 19 What happened here is you filed something which has  
09:41:08 20 absolutely nothing to do with anything other than  
09:41:13 21 attempting, I presume -- it isn't an appropriate filing.  
09:41:18 22 You're not appearing in this case, are you?

09:41:20 23 MS. PETTIT: No, Your Honor. I do not  
09:41:22 24 appear -- I did not appear in this case.

09:41:24 25 THE COURT: So you're kind of a volunteer, and

09:41:26 1 you write this letter to say -- you might as well just be  
09:41:32 2 somebody sitting --

09:41:33 3 No. Sit down.

09:41:37 4 MR. MAZZARA: Your Honor, I just wanted to --

09:41:38 5 THE COURT: No, sir. Not yet.

09:41:42 6 MR. MAZZARA: All right.

09:41:43 7 THE COURT: I will give you plenty of  
09:41:44 8 opportunity.

09:41:47 9 MR. MAZZARA: Fair enough, Your Honor. I just  
09:41:48 10 want to, again, lodge an objection to this line of  
09:41:51 11 questioning.

09:41:52 12 THE COURT: I don't know what line of  
09:41:53 13 questioning you're talking about that there's an  
09:41:55 14 objection to. All I'm saying is she's not appeared, and  
09:41:59 15 she's acknowledged that she hasn't appeared.

09:42:00 16 MR. MAZZARA: In this case, Your Honor, before  
09:42:02 17 the trial court.

09:42:02 18 THE COURT: That's correct.

09:42:04 19 MR. MAZZARA: Okay.

09:42:05 20 THE COURT: She hasn't appeared here.

09:42:09 21 MR. MAZZARA: She has appeared in the Fifth  
09:42:10 22 Circuit and argued the *en banc* case.

09:42:13 23 THE COURT: That's fine. That is fine.

09:42:15 24 MR. MAZZARA: But I also still stand on the  
09:42:17 25 objection about this line of questioning into

09:42:20 1 the appellate --

09:42:20 2 THE COURT: Counsel, listen. If you don't  
09:42:22 3 listen to me, I'm going to have to ask you to step  
09:42:26 4 outside. I told you I would give you plenty of  
09:42:29 5 opportunity to address the court, and you will have that  
09:42:34 6 opportunity and I respect your opportunity to do so. But  
09:42:39 7 I can't have you jumping up like a jack-in-the-box every  
09:42:42 8 two minutes.

09:42:44 9 MR. MAZZARA: Understood, Your Honor.

09:42:45 10 THE COURT: You're not even a member of this  
09:42:47 11 court. You're lucky that I'm even letting you say  
09:42:52 12 anything here.

09:42:53 13 MR. MAZZARA: Thank you, Your Honor.

09:42:55 14 THE COURT: So you wrote this letter, not  
09:43:01 15 having been present, and your letter unfortunately  
09:43:04 16 contains a number of inaccuracies.

09:43:09 17 MS. PETTIT: Respectfully, sir, we have checked  
09:43:12 18 it against the transcript that we got last night, and we  
09:43:16 19 consider it to be accurate and stand behind everything.

09:43:18 20 THE COURT: I'm very happy you did. I can  
09:43:20 21 assure you we did, and I know what I said.

09:43:22 22 So let's go through it, okay?

09:43:25 23 MS. PETTIT: Certainly.

09:43:26 24 THE COURT: First of all, you make a big deal  
09:43:29 25 out of the fact that, without prompting from either

09:43:32 1 party, the District Court raised the possibility that  
09:43:37 2 Judge Willett's opinion from the *en banc* court might not  
09:43:41 3 be precedential based on unspecified voices and chatter  
09:43:45 4 the District Court had heard or read from *ex parte*  
09:43:48 5 sources who suggested that the opinion was not entirely  
09:43:51 6 clear.

09:43:51 7 That is absolutely true. That is true. I will  
09:43:57 8 agree with you. I did raise it. The implication here is  
09:44:02 9 that the court did so for the purpose of attempting to  
09:44:06 10 encourage or announce its belief that Judge Willett's  
09:44:11 11 opinion was not precedential or that I did not have the  
09:44:15 12 authority or the right to raise it *ex parte*.

09:44:21 13 Let me read something to you, okay? This is  
09:44:23 14 from the Fifth Circuit. It comes from a case called  
09:44:30 15 *Ioannides v. The University of Texas M.D. Anderson*  
09:44:33 16 *Center*, 418 F. App'x 269. It's a Fifth Circuit 2011  
09:44:39 17 case. I presume it's unpublished, but it's okay.

09:44:41 18 Here's what it says: The District Court did  
09:44:45 19 not error by considering substantive process issues  
09:44:53 20 *sua sponte*, because the parties briefed it. As long as  
09:44:57 21 the parties are given notice and opportunity to brief an  
09:45:00 22 issue, the court can consider it *sua sponte*. Any issue.  
09:45:06 23 Ultimately, what matters is the party knew the issue  
09:45:09 24 could be considered by the District Court. So here we  
09:45:14 25 are asking the parties to brief what the law is

09:45:17 1 applicable at the bench trial, giving the parties notice  
09:45:21 2 and ability to brief it.

09:45:23 3 That was precisely what I was doing. I was  
09:45:29 4 calling the issue to the attention of the parties, which  
09:45:33 5 is not only my right, it is my obligation.

09:45:41 6 MS. PETTIT: Yes, Your Honor.

09:45:43 7 THE COURT: You got that?

09:45:44 8 MS. PETTIT: Yes, Your Honor.

09:45:44 9 THE COURT: Okay. And I wanted to give the  
09:45:46 10 parties the opportunity to brief it. This was written in  
09:45:50 11 the sense that I was somehow being proactive in  
09:45:57 12 supporting the theory that Judge Willett's opinion was  
09:46:03 13 not precedential, and I went out on my own to find an  
09:46:09 14 issue and then to encourage the parties to brief it. You  
09:46:13 15 make another misstatement there also, by the way, that  
09:46:16 16 you will find is not in the -- in the record. I'll get  
09:46:21 17 to that in just a minute.

09:46:22 18 So do you know who Judge Posner is?

09:46:33 19 MS. PETTIT: Yes, Your Honor.

09:46:33 20 THE COURT: Okay. Well, here's what  
09:46:36 21 Judge Posner says about this. He says: They want to do  
09:46:42 22 justice as well as merely not umpire disputes. And they,  
09:46:48 23 the district courts, should not be criticized when they  
09:46:51 24 point out to counsel a line of argument or inquiry that  
09:46:55 25 has been overlooked.

09:47:03 1 Courts of appeals -- and I know because I sat  
09:47:06 2 on the Ninth Circuit Court of Appeals for 35 years -- and  
09:47:10 3 district courts regularly ask the parties *sua sponte* to  
09:47:18 4 brief issues that the parties may not have been aware of  
09:47:22 5 or which the court feels should be briefed on both sides.

09:47:32 6 So long as the court gives the parties the  
09:47:35 7 opportunity to do so, and then fairly and adequately  
09:47:40 8 reviews those briefings and takes them under  
09:47:46 9 consideration, this circuit and every single circuit has  
09:47:54 10 said, including the Supreme Court -- which often does  
09:47:58 11 this, by the way -- that it is appropriate and, at times,  
09:48:05 12 necessary.

09:48:07 13 It is not and was not my intent, as you seem to  
09:48:13 14 imply here, to give to the parties some sort of marching  
09:48:24 15 orders. You did not point out in your letter, which it  
09:48:29 16 would have been fair for you to do if you were trying to  
09:48:33 17 write a balanced letter, that I had mentioned at least  
09:48:39 18 three to four times emphatically that I have not made up  
09:48:45 19 my mind in this matter; that I indeed might find  
09:48:54 20 Judge Willett's opinion precedential.

09:48:56 21 In fact, it is my fallback, and always has been  
09:49:02 22 for the over 30 years I've been on the bench, that when a  
09:49:07 23 majority opinion comes out, even if there are strong  
09:49:10 24 dissents, to follow that majority opinion. And my  
09:49:14 25 inclination is to do so here.

09:49:16 1                   But there is an issue, and that issue needs to  
09:49:22 2 be briefed. Here's the reason: This case is not going  
09:49:26 3 to end with the Fifth Circuit. If by sending this letter  
09:49:32 4 it was your intent to alert Judge Ho that he had not  
09:49:38 5 written on this issue and to try to get him to amend his  
09:49:41 6 opinion, that might work. I don't know. It wouldn't  
09:49:47 7 look good, but it might work. I --

09:49:55 8                   You'll get a chance.

09:49:58 9                   So that's number one. What you should have  
09:50:03 10 said in this letter, if you were trying to be, as you  
09:50:08 11 say, just informing the Fifth Circuit, is that, oh, by  
09:50:12 12 the way, Judge Ezra did say on multiple occasions that he  
09:50:17 13 did not have his mind made up and that he might indeed  
09:50:22 14 rule for Judge -- that Judge Willett's opinion was  
09:50:26 15 precedential. But you didn't do that.

09:50:27 16                   This is a -- this isn't a letter informing  
09:50:31 17 them. It wasn't a 28(j) letter. This was an argument.  
09:50:35 18 This is an argument trying to get the Fifth Circuit,  
09:50:38 19 either Judge Willett to rewrite his opinion or to get  
09:50:46 20 Judge Ho to change his opinion or to get judge -- Chief  
09:50:49 21 Judge Richman to somehow change her opinion. That's  
09:50:54 22 what -- I mean, it's pretty obvious.

09:50:56 23                   So let's go on.

09:50:57 24                   You say: Although undersigned was not present,  
09:51:07 25 the District Court reportedly opined that we have a

09:51:10 1 nine-nine split.

09:51:11 2                   What I said is it appears that there's a  
09:51:14 3 nine-nine split. It could be a nine-nine split. I don't  
09:51:18 4 know. And even if there were, what's the effect of it?  
09:51:25 5 I don't know that either.

09:51:26 6                   What I do know is that Judge Ho did not opine  
09:51:34 7 at all on the issue. He took a totally different tack.  
09:51:40 8 He felt that the case should be dismissed out of hand for  
09:51:47 9 jurisdictional reasons. So he partially dissented,  
09:51:50 10 actually. And we do know that Chief Judge Richman did  
09:51:57 11 not agree with the majority, in part. She joined in  
09:52:00 12 judgment, but she did not agree with the majority's  
09:52:03 13 reasoning that the way you -- on the way that you judge  
09:52:11 14 navigation, which was a hallmark of Judge Willett's  
09:52:16 15 opinion. We know she didn't agree with that.

09:52:18 16                   So that leaves -- that leaves us with some  
09:52:23 17 uncertainty. I mean, you're a lawyer, right?

09:52:27 18                   MS. PETTIT: Yes, Your Honor.

09:52:28 19                   THE COURT: And you're a good one --

09:52:30 20                   MS. PETTIT: Thank you, Your Honor.

09:52:31 21                   THE COURT: -- or you wouldn't be in your  
09:52:32 22 position. So you have to understand that.

09:52:37 23                   Now, you say, we have -- and then you say, and  
09:52:42 24 in quotes, as if this was all I said: Because  
09:52:47 25 Judge Richman did not agree with the majority --

09:52:50 1 I didn't say that. I didn't say she didn't  
09:52:52 2 agree with the majority. I said she didn't agree with  
09:52:54 3 the majority on the navigation issue only, which she  
09:52:59 4 didn't.

09:53:01 5 -- and the separate opinion by Judge Ho. And  
09:53:06 6 here you put this in quotes, "did not say anything at  
09:53:09 7 all," as if I was criticizing Judge Ho.

09:53:13 8 So let me make it very clear. I said  
09:53:16 9 specifically that I was not criticizing Judge Ho. I said  
09:53:22 10 that specifically. And I didn't say he didn't say  
09:53:26 11 anything at all. I said he didn't say anything at all on  
09:53:30 12 this issue, which he didn't. Not that he didn't say  
09:53:36 13 anything at all, as if he wrote a bunch of nonsense. I  
09:53:39 14 didn't say that. So why you left that out, I don't know.

09:53:47 15 Now, you say: Accordingly, the District Court  
09:53:51 16 ordered the parties to file additional briefs no later  
09:53:54 17 than September 20th -- that's true -- addressing the  
09:53:58 18 impact of the Court's *en banc* decision. That's also  
09:54:02 19 true. In the process the District Court provided  
09:54:06 20 citations to decisions that neither party had previously  
09:54:11 21 raised.

09:54:13 22 That's true: Supreme Court cases. I have every  
09:54:19 23 responsibility to draw the parties' attention to  
09:54:23 24 precedent. I believe that the Fifth Circuit is bound by  
09:54:28 25 the Supreme Court. I certainly am.

09:54:32 1 MS. PETTIT: Certainly, Your Honor.

09:54:33 2 THE COURT: Either party -- and then you say:

09:54:35 3 Either party might consider citing in support of an

09:54:40 4 argument the District Court need not follow

09:54:43 5 Judge Willett's opinion.

09:54:44 6 That is absolutely false. I did -- I dare you

09:54:49 7 to find, or any of your lawyers, anywhere in the

09:54:55 8 transcript where I said that, or even implied, these are

09:55:05 9 the cases that support an argument and I wanted them -- I

09:55:13 10 wanted the parties to follow that argument.

09:55:16 11 I said the opposite, the exact opposite. I

09:55:22 12 said these are cases that are out there. They do show

09:55:28 13 situations where there has been a split. I even gave as

09:55:40 14 support a case in which I handled as a member of the

09:55:42 15 Ninth Circuit Panel where there was a four-four split

09:55:47 16 because Justice Kagan could not participate because she

09:55:51 17 had been Solicitor General. And, on top of that, I said

09:56:03 18 that that was just an example.

09:56:05 19 But guess what? Where there is a four-four

09:56:08 20 split in the Supreme Court, it gets remanded to the

09:56:14 21 Circuit Court, the decision is upheld, but it isn't

09:56:17 22 precedential. You know that, right? You're a good

09:56:19 23 lawyer.

09:56:20 24 MS. PETTIT: It is precedential only to the

09:56:22 25 extent of what the issue was decided, but it is not

09:56:24 1 precedent for any arguments that were presented.

09:56:27 2 THE COURT: You're right, and you are correct.

09:56:30 3 It is only precedential in the Ninth Circuit. It isn't  
09:56:33 4 nationwide precedent.

09:56:34 5 MS. PETTIT: Yes, Your Honor.

09:56:35 6 THE COURT: Because the Supreme Court did not  
09:56:36 7 make a decision.

09:56:38 8 MS. PETTIT: Correct, Your Honor.

09:56:39 9 THE COURT: So I did not under any  
09:56:44 10 circumstances tell the parties to look at these cases for  
09:56:47 11 the purpose of finding Judge Willett's opinion to be  
09:56:52 12 nonprecedential, as you say in this letter. I didn't do  
09:56:55 13 that. You won't find it in the record. I looked again  
09:56:59 14 to make sure. My law clerks looked again to be sure.  
09:57:06 15 It's not there, because I didn't do it. It is  
09:57:12 16 misleading.

09:57:20 17 Now, the District Court also ordered the party  
09:57:22 18 to refile any pretrial filings and motions in limine on  
09:57:27 19 October 28th, with objections to follow on October 30th.

09:57:31 20 That was at the request of your own lawyers.

09:57:39 21 Meanwhile, the District Court opined a lot of  
09:57:41 22 people are shaking their heads at why the -- why Texas  
09:57:45 23 demand for a jury trial.

09:57:46 24 It's true. I can't -- I personally, as I sit  
09:57:55 25 here, don't know why Texas would want a jury trial in

09:57:58 1 this case. You see, I presumed you would want a jury  
09:58:02 2 trial if you thought that you had a sympathetic plaintiff  
09:58:11 3 or you had an issue which was somehow primed for a jury.  
09:58:23 4 This is on equitable case.

09:58:27 5 Would you like some water.

09:58:29 6 MS. PETTIT: No, thank you, Your Honor.

09:58:30 7 THE COURT: Okay. An equitable case. That was  
09:58:32 8 just an offhand comment. It wasn't anything more than an  
09:58:36 9 offhand comment. It had no precedential value. Who  
09:58:45 10 cares? You've asked for a jury. The Fifth Circuit is  
09:58:49 11 looking at it, and they will rule. And whatever they  
09:58:51 12 rule, I will abide by. It doesn't matter to me.

09:58:56 13 But let's not forget something. It appears the  
09:59:00 14 State of Texas has some idea in its head -- from where, I  
09:59:04 15 don't know -- that I am not the right judge for this case  
09:59:09 16 because I've already made up my mind. I haven't. Or  
09:59:14 17 that I am prejudiced against the State of Texas. I am  
09:59:17 18 not.

09:59:18 19 Let's look at a little history. Not that long  
09:59:25 20 ago there was a law passed by the Texas State  
09:59:31 21 Legislature, a very popular law by some and unpopular by  
09:59:37 22 others, called the fetal burial law. Are you familiar  
09:59:41 23 with that?

09:59:41 24 MS. PETTIT: Yes, Your Honor.

09:59:42 25 THE COURT: Okay. Guess who handled that case?

09:59:44 1 MS. PETTIT: I believe you did, Your Honor.

09:59:46 2 THE COURT: I did. Now, the only decision that

09:59:49 3 had been rendered on that exact law was rendered by the

09:59:55 4 Tenth Circuit. They had ruled that that statute -- not

10:00:03 5 the Texas one, but the one that they were dealing with,

10:00:06 6 which is exactly the same -- was flat-out

10:00:11 7 unconstitutional, and they struck it down.

10:00:15 8 And then there was an appeal by the State to

10:00:17 9 the United States Supreme Court which was pending at the

10:00:21 10 time I made my ruling. So the only decision out there on

10:00:26 11 the fetal burial law was that it was unconstitutional,

10:00:30 12 and that was by a circuit court of appeals, not a

10:00:33 13 district court.

10:00:33 14 I looked at it very carefully, and my view was

10:00:41 15 that the Tenth Circuit was wrong, that Texas was right,

10:00:43 16 and I ruled for the State of Texas that the law was in

10:00:46 17 fact constitutional. Subsequently, the Supreme Court

10:00:55 18 reversed the Tenth Circuit and found the law

10:00:59 19 constitutional.

10:01:02 20 Now, we didn't get a full ruling on that case

10:01:04 21 because that case basically mooted the issue. It went

10:01:12 22 away. So Judge Costa and the rest of that panel end up

10:01:18 23 dismissing the case. That was a big ruling, it was a

10:01:23 24 tough ruling, and I ruled for the State, as I have in

10:01:26 25 many other cases, including this one.

10:01:30 1 In this case the United States had two causes  
10:01:33 2 of action. After very thorough briefing, and it was a  
10:01:40 3 very tough issue, I ruled for the State of Texas in this  
10:01:43 4 case and dismissed that cause of action.

10:01:47 5 Are you aware of that?

10:01:49 6 MS. PETTIT: Yes, Your Honor.

10:01:50 7 THE COURT: All right. Now, finally, let's get  
10:01:57 8 to the last part of it, because this is what really kind  
10:02:01 9 of made me -- really got me puzzled.

10:02:09 10 You say: Texas' demand for a jury trial, and  
10:02:18 11 indicated that I may reopen discovery, but only if the  
10:02:24 12 Fifth Circuit holds Texas is entitled to a jury. Okay.  
10:02:32 13 Because the circumstances would have changed, in my view.

10:02:39 14 This was put in here, for whatever reason, I  
10:02:43 15 presume to indicate that somehow I was favoring the  
10:02:47 16 federal government by reopening discovery. Let me read  
10:02:51 17 you, if I may, from the transcript of what Mr. Walters --

10:02:59 18 Help me find this, will you, Rose?

10:03:01 19 -- what Mr. Walters said, because I thought  
10:03:03 20 Mr. Walters made an excellent point. Okay? Can you help  
10:03:09 21 me find -- right here on my papers somewhere. Where is  
10:03:14 22 it? Because I don't want to keep them here unnecessarily  
10:03:19 23 for a long time while I'm searching for this. You had  
10:03:25 24 highlighted what Mr. Walters had said somewhere.

10:03:35 25 Come up here. Help me find it.

10:04:01 1 I want to quote you correctly, Mr. Walters.

10:04:03 2 MR. WALTERS: I appreciate it, Your Honor.

10:04:12 3 THE COURT: Okay. Here's the discussion that

10:04:15 4 you were so concerned about, all right? It started with

10:04:17 5 Mr. Lynk. This is where I said I may reopen discovery.

10:04:23 6 "MR. LYNK: Understood. On August the 2nd, on

10:04:27 7 Friday, obviously, there were a number of things that

10:04:30 8 originally were due, and we understood that those were

10:04:34 9 suspended as of last week under the -- in the

10:04:37 10 circumstances.

10:04:39 11 "THE COURT: What were those?

10:04:41 12 "Generally, the response to July 26th pretrial

10:04:44 13 filing: objections to witnesses, objections to things

10:04:47 14 like, that." That's Mr. Lynk.

10:04:50 15 "THE COURT: Those I think probably should

10:04:53 16 wait. And the reason for this is that we're still

10:04:59 17 waiting to figure out whether we have a jury or we don't

10:05:02 18 have a jury. And you may decide to go with certain

10:05:07 19 witnesses if you have a jury. I may even allow, because

10:05:13 20 if -- if it stays the way it is, if the Fifth Circuit

10:05:16 21 rules there is no jury in this case, because it's

10:05:19 22 equitable, then I won't reopen.

10:05:21 23 "But if we -- if we have a change in the

10:05:24 24 landscape and say, well, you're going to have a jury now

10:05:30 25 out of the blue, then I may allow the parties to add

10:05:33 1 additional witnesses. And that may impact our trial  
10:05:36 2 date."

10:05:36 3 In fairness to both parties, by the way.

10:05:42 4 "MR. WALTERS: We would suggest that if the  
10:05:47 5 Court is considering reopening discovery -- so we don't  
10:05:51 6 know that yet, whether the Department of Justice wants  
10:05:53 7 that -- when the Fifth Circuit rules on our right to a  
10:05:56 8 jury trial --

10:05:58 9 "THE COURT," here's what I say: "I can assure  
10:06:00 10 you that will not happen if they deny the request for a  
10:06:05 11 jury trial, only because then that -- that means that the  
10:06:08 12 tenor of the case has been the same since its inception."

10:06:11 13 It was only recently that Texas really asked  
10:06:15 14 for a jury.

10:06:17 15 All right.

10:06:17 16 "MR. WALTERS: Right. What we're saying --"

10:06:22 17 And this is the Court, but -- this is me, now.

10:06:25 18 "But if they -- if they say the State gets a  
10:06:29 19 jury or gets a partial jury trial on some issues but not  
10:06:34 20 others, then I would consider it. I'm not saying I would  
10:06:37 21 grant it, but I would certainly consider it."

10:06:40 22 Now, here's the critical part. This is  
10:06:45 23 Mr. Walters, your lawyer.

10:06:47 24 "But, Your Honor, I guess our position is that,  
10:06:51 25 if the Fifth Circuit were to find we are entitled to a

10:06:55 1 jury trial, the Court would have to resolve these motions  
10:06:58 2 again because the standard would be different. So we  
10:07:07 3 would suggest not wasting the Court's time in resolving  
10:07:10 4 these motions before we get a ruling from the  
10:07:12 5 Fifth Circuit on --"

10:07:15 6 Then I say: "I don't know that the legal  
10:07:16 7 standard would be different."

10:07:19 8 And here's Mr. Walters:

10:07:22 9 "Well, the standard for considering, like,  
10:07:25 10 experts" -- which is what I was concerned about --  
10:07:28 11 "whether they're going to be excluded or not, would be  
10:07:30 12 different."

10:07:31 13 And here's what I say to Mr. Walters:

10:07:34 14 "Oh, I see what you're saying, in a practical  
10:07:37 15 sense. Yeah. I would agree with you. I told you I will  
10:07:42 16 take a look at it. I haven't made up my mind on that,  
10:07:46 17 yet. I'll take a good look at it, okay?

10:07:49 18 "MR. WALTERS: Thank you."

10:07:52 19 That's what that was all about. Your side  
10:08:00 20 appropriately, because they're trial lawyers and they're  
10:08:05 21 good ones, is concerned that if the tenor of the case  
10:08:08 22 changes from a nonjury trial to a jury trial, they may  
10:08:12 23 need or may ask me to add an additional witness or two  
10:08:16 24 because they've got to prove the case to the jury.

10:08:18 25 I have been involved in this case for a very

10:08:22 1 long time, and I understand the landscape. I know what's  
10:08:29 2 there. I've heard lots and lots of testimony in this  
10:08:32 3 case. So they would not have to educate me on the facts  
10:08:39 4 or on the expert opinions, because I've heard it, or at  
10:08:46 5 least part of it.

10:08:49 6 But a jury is different. They come in with a  
10:08:54 7 clean slate. They have not heard it. They have not seen  
10:08:57 8 it. They don't know what it's all about. So they need  
10:09:02 9 to be carefully educated. That was my concern.

10:09:11 10 You can be seated. Thank you very much.

10:09:13 11 MS. PETTIT: Thank you.

10:09:17 12 MR. WALTERS: Your Honor, if I could just ask a  
10:09:19 13 brief question. In our -- in the letter that was filed  
10:09:21 14 in the Fifth Circuit, the last line references this:  
10:09:24 15 When transcripts became available, we would submit them  
10:09:29 16 to the Fifth Circuit. I understand Your Honor has  
10:09:32 17 expressed a lot of concern about the Fifth Circuit not  
10:09:35 18 getting the full context of what occurred in yesterday's  
10:09:38 19 hearing. So we would ask for your direction as to  
10:09:41 20 whether you would like the rough transcripts of both  
10:09:44 21 yesterday --

10:09:44 22 THE COURT: The final transcript is done, is it  
10:09:47 23 not? The final transcript is done. I'm not trying to  
10:09:53 24 hide anything from the Fifth Circuit. Believe me. First  
10:09:57 25 of all, I've spent 35-plus years of my life having

10:10:01 1 everything I said put down in writing. I'm not running  
10:10:09 2 away from yesterday.

10:10:11 3 What worries me and gave me concern is that  
10:10:15 4 this letter -- I'm not saying that Ms. Pettit did this  
10:10:22 5 intentionally. I -- to be honest with you, I've heard  
10:10:26 6 nothing but good things about Ms. Pettit, to be honest  
10:10:30 7 with you. I've heard that she's a good lawyer, and I  
10:10:34 8 heard that she does her job well. And I have no personal  
10:10:40 9 animus whatsoever against Ms. Pettit.

10:10:45 10 But my concern is this. My concern is this:  
10:10:51 11 Somebody -- and I don't think it's really Ms. Pettit.  
10:10:54 12 But somebody seems to think that by sending a letter like  
10:10:59 13 this in to the Fifth Circuit, they are in a position to  
10:11:07 14 influence the Fifth Circuit to do something they might  
10:11:10 15 not otherwise do. Why else would the letter be sent?

10:11:17 16 And I don't even know whether she actually  
10:11:20 17 drafted the letter. My -- maybe, but maybe not. The  
10:11:25 18 point is that it contains some flat-out inaccuracies, but  
10:11:32 19 more important than that, half-truths. Things are taken  
10:11:36 20 out of context. And that -- that's a shame. The Fifth  
10:11:42 21 Circuit deserves better than that. You can be seated,  
10:11:45 22 Counsel.

10:11:45 23 MR. WALTERS: Thank You, Your Honor.

10:11:50 24 MR. STONE: I just wanted to add one thing.  
10:11:50 25 I'm sorry you feel that way. I want to add something

10:11:52 1 that -- just a point of correction for the last point  
10:11:53 2 that you were making with Ms. Pettit, specifically about  
10:11:56 3 reopening discovery.

10:11:57 4 At no point did Texas indicate that we were  
10:12:00 5 open to reopening discovery or that that was even on the  
10:12:03 6 table. That discussion that you quoted from Mr. Walters  
10:12:06 7 was specifically in reference to deciding motions like  
10:12:08 8 motions in limine.

10:12:09 9 THE COURT: Well, first of all, Mr. Walters can  
10:12:11 10 speak for himself. But, in any event, go ahead.

10:12:14 11 MR. STONE: It was specifically in reference  
10:12:16 12 things like motions in limine.

10:12:17 13 THE COURT: Yeah. I don't see anything here  
10:12:19 14 that says anything about motions in limine.

10:12:22 15 MR. STONE: As well as experts, Your Honor. We  
10:12:23 16 filed motions to exclude.

10:12:24 17 THE COURT: It doesn't -- but, Counsel, it  
10:12:25 18 doesn't matter. It doesn't matter. I said clearly that  
10:12:31 19 I had not made up my mind as to whether I would reopen  
10:12:36 20 discovery. I would hear argument on that. It just means  
10:12:41 21 that I had not made a decision, and the tenor of the  
10:12:46 22 letter that was sent indicated that I had. And I hadn't.  
10:12:50 23 And I made that very clear to Mr. Walters.

10:12:53 24 I said I would agree with you there. I agree  
10:12:58 25 with Mr. Walters. I frequently agree with Mr. Walters.

10:13:02 1 I agree with you there. I told you I will take a look at  
10:13:05 2 it. I haven't made up my mind on that yet. I will take  
10:13:10 3 a very good look at it.

10:13:13 4 That's what I said. So you can be seated.

10:13:17 5 MR. STONE: Your Honor, although I will add  
10:13:18 6 just for the record that I don't think that that final  
10:13:19 7 sentence in the letter doesn't -- I think it says exactly  
10:13:22 8 that, that you were open to the possibility of reopening  
10:13:25 9 discovery depending on whether or not -- depending on the  
10:13:27 10 outcome of that jury issue. That's what the letter said,  
10:13:32 11 Your Honor, just so the record reflects that. Thank you.

10:13:32 12 THE COURT: Let me look at it. I don't have it  
10:13:32 13 right in front of me. What did I do with it?

10:13:48 14 MR. STONE: I can read the sentence.

10:13:50 15 THE COURT: No. It's okay. I'm looking for  
10:13:51 16 it. I'll find it. It's here somewhere. Here it is. We  
10:14:15 17 found it. It got buried.

10:14:38 18 Okay I don't know why this sentence was put in  
10:14:40 19 the letter. I mean, it just doesn't make sense to me. I  
10:14:44 20 mean, why is it here?

10:14:45 21 MR. STONE: Because Texas will be materially  
10:14:48 22 prejudiced if you reopen discovery, in our opinion.

10:14:50 23 THE COURT: That's something we will decide.

10:14:52 24 MR. STONE: Agreed, Your Honor.

10:14:53 25 THE COURT: And I said that.

10:14:55 1 MR. STONE: Yeah.

10:14:55 2 THE COURT: But why is it here? Why is it in  
10:14:59 3 this letter? What does it have to do with anything? It  
10:15:02 4 doesn't have to do with anything.

10:15:05 5 The real key to this letter is Texas was trying  
10:15:09 6 to leave the impression with the *en banc* court that I had  
10:15:15 7 made a decision or that I had somehow indicated, God  
10:15:26 8 forbid, that there was an issue with respect to which was  
10:15:33 9 the controlling opinion, if any. And that is a terrible  
10:15:39 10 thing to do.

10:15:41 11 You know, I'll tell you what the worst part of  
10:15:44 12 this is. And I don't think it's true. I really don't  
10:15:49 13 think it's true. It could leave somebody with the  
10:15:54 14 impression that the State of Texas thinks they've got the  
10:15:57 15 Fifth Circuit in their back pocket.

10:15:59 16 Now, I don't think you believe that. I really  
10:16:04 17 don't think the Attorney General's Office believes that  
10:16:08 18 they have the State of Texas in their back pocket and  
10:16:12 19 they can just file anything they want, prejudice the  
10:16:17 20 Court against this Court, and get a successful ruling. I  
10:16:21 21 do not believe the Attorney General's Office believes  
10:16:24 22 that. If I did, you would know it.

10:16:31 23 MS. PETTIT: Your Honor, for the record, we  
10:16:33 24 definitely do not.

10:16:34 25 THE COURT: You don't have to tell me that. I

10:16:36 1 already said I don't believe that you do. But somebody  
10:16:40 2 who just read this and would say why did they send this  
10:16:43 3 in? What was purpose of it? What is the big, important  
10:16:49 4 issue here? I don't know. I don't know why it was sent  
10:17:00 5 in. It was ill-advised.

10:17:03 6 It really shouldn't have been sent, because  
10:17:06 7 it's neither a Rule 28(j) letter -- and if it's not a  
10:17:10 8 28(j) letter, what is it? It's just a notice to the  
10:17:15 9 Fifth Circuit that, gosh, you know that Judge David Ezra  
10:17:19 10 actually said that, with this big split court, there  
10:17:27 11 might be an issue as to whether Judge Willett's opinion  
10:17:32 12 is precedential. Heaven forbid.

10:17:41 13 Do you think Judge Willett, who I know well and  
10:17:44 14 who is a fine United States Circuit Judge of the highest  
10:17:49 15 integrity, is going to read this and not sleep at night  
10:17:54 16 and just say, oh, my God? He's going to read the  
10:17:58 17 transcript, and he's going to see that David Ezra said in  
10:18:02 18 multiple places that I have no opinion on that at all.

10:18:10 19 And I will say it again. My fallback position  
10:18:15 20 is that Judge Willett's opinion is precedential, and I'm  
10:18:21 21 inclined to find that it is. And I'll say that.

10:18:26 22 But there is an issue. We have a deeply  
10:18:32 23 divided opinion. And it is in Judge -- and it's a fact  
10:18:40 24 that Judge Ho did not weigh in on this issue. Maybe he  
10:18:44 25 will now. Maybe he'll file some sort of an amended

10:18:48 1 opinion now that he's gotten your letter. I don't know.  
10:18:51 2 But he could do that at any time. Maybe that was the  
10:18:55 3 purpose of it. I don't know. I hope not. Or maybe  
10:19:00 4 Judge Willett will file -- I have no idea.

10:19:07 5 But I surely don't understand, and have never  
10:19:12 6 in my entire career -- and I've handled big cases all  
10:19:21 7 across the country, big ones, much bigger than this. And  
10:19:29 8 I've handled big cases sitting on the Court of Appeals.  
10:19:31 9 I have never seen a letter like this filed, ever.

10:19:39 10 And maybe I'm just naive. No judge that I've  
10:19:48 11 raised this with and talked to about this, just asked  
10:19:54 12 them if this is a policy or if they've ever seen it,  
10:19:57 13 nobody had ever seen it. And we're talking about  
10:20:00 14 conservative judges now that I talked to. Nobody had  
10:20:03 15 ever seen it or heard of it.

10:20:09 16 And at the time we thought it was a rule, as  
10:20:16 17 you put it originally, a Rule 28(j) letter. They said,  
10:20:22 18 Well, that's obviously not a 28(j) letter.

10:20:28 19 And if it's not a 28(j) letter, then what is  
10:20:33 20 it? It's just telling them that I had a status  
10:20:36 21 conference with the parties, I raised an issue which I  
10:20:39 22 had heard -- I actually hadn't thought about it myself  
10:20:43 23 initially. I just read Judge Willett's opinion, I read  
10:20:46 24 all the other opinions and I just let it go at that and  
10:20:50 25 set the status conference.

10:20:51 1                   But then I heard some chatter. And then I  
10:20:59 2 looked at it more carefully, and I thought this is  
10:21:02 3 probably an issue that should be briefed, that we should  
10:21:07 4 look at carefully, because this case may well not end  
10:21:14 5 with the Fifth Circuit, regardless of what they do. It  
10:21:18 6 could go to the Supreme Court.

10:21:21 7                   And if I just take one position or another  
10:21:27 8 without getting the full briefing of both sides and  
10:21:30 9 carefully considering it, and it goes up to the Supreme  
10:21:35 10 Court and they say, Wow, Ezra was wrong, that wasn't a  
10:21:39 11 precedential opinion, he shouldn't have treated it as  
10:21:42 12 such, or it was a precedential opinion and he didn't  
10:21:46 13 treat it as such, the other way, it comes all the way  
10:21:51 14 back down and we start all over again.

10:21:54 15                   That doesn't make any sense. I have great  
10:21:58 16 faith in the quality of the lawyers in this case. I've  
10:22:04 17 read your briefing. Your briefing is good. And I am  
10:22:10 18 looking to you to help me make the right decision here.  
10:22:16 19 That's what this is all about. Just like I did, in my  
10:22:22 20 view -- the United States doesn't agree -- when I  
10:22:25 21 dismissed their cause of action in involving Mexico  
10:22:35 22 international law. I got very good briefing on that, and  
10:22:38 23 I ruled for the State because I think, looking at it  
10:22:42 24 carefully, Texas is right. It's not a cause of action  
10:22:48 25 here. Political question.

10:22:55 1 So, again, Ms. Pettit, I want to emphasize to  
10:23:01 2 you that, first of all, I want to thank you for showing  
10:23:05 3 up. I didn't order you here, you didn't have to come  
10:23:09 4 here, and you didn't have to subject yourself to being  
10:23:14 5 questioned by me on this letter. And your willingness to  
10:23:22 6 do so says a lot, not only about you personally but about  
10:23:29 7 your belief in your office. And that I think is  
10:23:34 8 important. So I thank you very much for coming. You  
10:23:39 9 didn't have to do it. I didn't order -- I could have  
10:23:43 10 ordered you here, but I didn't. I simply requested that  
10:23:46 11 you come. And you could have said, ah, I'm not coming.  
10:23:50 12 We've got lawyers.

10:23:52 13 I want to thank counsel for her. You did the  
10:23:55 14 best job you could. You didn't -- I didn't attack her in  
10:23:58 15 any way, shape, or form. I'm not attacking her. I don't  
10:24:03 16 know whether she even actually wrote the letter. She's  
10:24:06 17 at a level where frequently other people write letters.  
10:24:11 18 And so the errors in the letter may not even be hers.

10:24:18 19 But it doesn't matter. I'm not mad. I don't  
10:24:25 20 hold grudges. In my entire career as a federal judge,  
10:24:33 21 all the cases I've handled, all the circuits that have  
10:24:37 22 heard my appeals, I have never to my knowledge been  
10:24:44 23 removed -- or my recollection -- from a case for bias or  
10:24:50 24 for any other reason.

10:24:51 25 Now I've recused myself because I had a

10:24:53 1 conflict. But I don't have a bias against the State of  
10:24:59 2 Texas, and my record here proves it. By the way, I  
10:25:04 3 handle a lot of State of Texas cases. They have nothing  
10:25:08 4 to do with big issues like we have here, and I rule for  
10:25:12 5 the State of Texas frequently. Nothing against the State  
10:25:17 6 of Texas.

10:25:20 7 I love the State of Texas, actually. I didn't  
10:25:23 8 have to become a member of the Texas Bar, but I did.  
10:25:29 9 Why? Because I'm proud to be a member of the Texas Bar.  
10:25:38 10 That's why. And my good friend, the Chief Justice, swore  
10:25:42 11 me in his office. And I'm very proud of that, too.

10:25:47 12 And let me say again: I have no animus or any  
10:25:52 13 concern about the Fifth Circuit Court of Appeals. They  
10:25:56 14 will do whatever they need to do. Now, am I always happy  
10:25:59 15 about every ruling they -- they hand down? No.  
10:26:04 16 Absolutely not.

10:26:06 17 Look. I am very good friends with many of the  
10:26:12 18 those judges. I don't know all of them well, but I know  
10:26:15 19 most of them. And I have a wonderful relationship  
10:26:19 20 with -- even like Judge Willett and I have a good  
10:26:24 21 relationship. He's a great judge. Judge Elrod and I are  
10:26:29 22 very good friends, very good friends. Judge -- Chief  
10:26:36 23 Judge Richman and I are very good friends. Judge Oldham  
10:26:41 24 and I are friends.

10:26:43 25 Now, Judge Elrod was in the majority that

10:26:47 1 reversed me in this. You think that makes any difference  
10:26:49 2 to me? Absolutely not. She was doing her job the way  
10:26:54 3 she thought she needed to do it. Judge Willett wrote the  
10:26:58 4 opinion. Do I agree with him? No. But I don't think  
10:27:03 5 that makes me a nut. There's a lot of Fifth Circuit  
10:27:09 6 judges that didn't agree with them. So I don't think I'm  
10:27:13 7 some sort of wild outlier here.

10:27:17 8 And President Ronald Reagan wasn't known for  
10:27:26 9 appointing left-wing radical jurists, and I don't think  
10:27:35 10 I've ever proven to be one. So I am going to ask that  
10:27:44 11 when you send the transcript up to the Fifth Circuit, you  
10:27:48 12 send this transcript with it, today's transcript.

10:27:55 13 MS. PETTIT: Certainly, Your Honor.

10:27:56 14 THE COURT: Okay?

10:27:58 15 MR. WALTERS: Absolutely, Your Honor.

10:27:59 16 THE COURT: Okay. Let them have both  
10:28:01 17 transcripts. If they're going to read a transcript, let  
10:28:03 18 them read it all.

10:28:05 19 MS. PETTIT: Absolutely.

10:28:06 20 THE COURT: They may be mad at me for calling  
10:28:09 21 this hearing. I don't know. But I don't think so. I  
10:28:11 22 mean, I don't think when I -- when we left yesterday, I  
10:28:16 23 thought we were on solid ground as to what we were doing.  
10:28:22 24 I thought we understood what we were doing, and we were  
10:28:25 25 going forward.

10:28:26 1 I don't think -- I really don't think either  
10:28:30 2 party, when they left -- tell me, please, if you will.  
10:28:34 3 Did any party feel that the process that I set forth was  
10:28:38 4 prejudicial or in some way did not follow what you would  
10:28:45 5 like to have been done? I don't think so. I certainly  
10:28:50 6 would have heard -- we don't have any shrinking flowers  
10:28:53 7 here.

10:28:55 8 In fact, I agreed with the State of Texas more  
10:28:59 9 than I agreed with the government -- the federal  
10:29:01 10 government. You're the government, too. You're a  
10:29:06 11 sovereign government, to use Governor Abbott's words,  
10:29:14 12 which I agree with, by the way. Texas is a sovereign  
10:29:17 13 state. It's a government, and it needs to be treated as  
10:29:21 14 such.

10:29:21 15 So that's where we are. I intend to follow  
10:29:35 16 through with the plan we worked out, and I hope when we  
10:29:41 17 hear from the Fifth Circuit -- which it's a legal  
10:29:47 18 question. You know, if the Fifth Circuit says, look,  
10:29:50 19 they're entitled to a jury trial, that will be an issue  
10:29:53 20 the Supreme Court will have to decide, ultimately. But  
10:29:56 21 you're going to get a jury trial.

10:29:57 22 I mean, I think it's an equitable cause of  
10:30:01 23 action. They're not seeking money damages. They're  
10:30:04 24 seeking to have you remove the buoy. And with respect to  
10:30:08 25 the potential of a fine, the government has not ever

10:30:13 1 indicated they're looking to recover a fine in this case.  
10:30:19 2 They're not pursuing that remedy. They just want  
10:30:23 3 equitable remedy. And, even if they were pursuing it, we  
10:30:26 4 could handle that at a later time, and it would be a jury  
10:30:28 5 trial.

10:30:28 6 But that's not -- I mean, are we even going to  
10:30:34 7 get that far? I don't know. As I said the other day,  
10:30:39 8 the United States may look at this and say, look, there's  
10:30:42 9 no really -- there's no way, given the Fifth Circuit's  
10:30:46 10 ruling, that we can adequately proceed. And that we may  
10:30:52 11 have a trial on the record and have me enter judgment,  
10:31:01 12 and then they can take their appeal, as for a *writ of*  
10:31:08 13 *certiorari*.

10:31:08 14 I guess they would have to appeal to the Fifth  
10:31:11 15 Circuit first, because that would be a trial on the  
10:31:14 16 merits, the other -- we keep forgetting that that *en banc*  
10:31:18 17 ruling was not on the merits of the case, it was on the  
10:31:22 18 preliminary injunction. This thing is so complicated,  
10:31:27 19 even I lose track of it half the time.

10:31:29 20 All right. Again, I want to thank all of you  
10:31:33 21 for being here. And, by the way, if you don't think --  
10:31:37 22 this is the really odd part of it. There's a reporter  
10:31:44 23 for *The Statesman* who I've never personally met, who  
10:31:50 24 happens to be an excellent reporter. What is his name  
10:31:54 25 again? He's already got an article out on this.

10:32:03 1 Is it Jeremy?

10:32:06 2 THE CLERK: I don't think so. I don't have

10:32:07 3 Internet.

10:32:08 4 THE COURT: What is his name? Are you out

10:32:10 5 here? What is your name, sir.

10:32:12 6 MR. MORITZ: Your Honor, I'm John Moritz with

10:32:13 7 the *Austin American-Statesman*.

10:32:14 8 THE COURT: There you go. Mr. Moritz.

10:32:16 9 Mr. Moritz is an excellent reporter. I read

10:32:20 10 his articles many times. He generally gets it absolutely

10:32:24 11 right, which is not something that happens often. And

10:32:30 12 he's already written an article on this, and he has

10:32:33 13 brought out the facts in that article.

10:32:36 14 Do you think that these Fifth Circuit judges

10:32:39 15 live in some sort of a bubble and they don't read the

10:32:42 16 newspaper? They do. We don't all live in a bubble.

10:32:52 17 They read the newspapers. They go to Baylor games like

10:32:53 18 me. Judge Willett's a big Baylor fan, as is Judge Elrod

10:33:00 19 and I. That's our connection. And Judge Richman, by the

10:33:05 20 way, Chief Judge Richman.

10:33:10 21 Okay. And he'll write another article today

10:33:12 22 maybe. I don't know. But he is a good reporter.

10:33:17 23 All right. Anything else you would like to put

10:33:20 24 on the record?

10:33:23 25 MR. WALTERS: We're always happy to meet with

10:33:25 1 you, Your Honor.

10:33:27 2 THE COURT: Not always. You're about as always  
10:33:32 3 happy to meet with me as I am to always read Fifth  
10:33:36 4 Circuit opinions. Most of the time I get affirmed. You  
10:33:39 5 know, I have a really good record in front of the Fifth  
10:33:41 6 Circuit, I'm proud to say. Unfortunately, sometimes,  
10:33:46 7 when I don't get affirmed, it's the ones that you read  
10:33:48 8 about. What can you say?

10:33:54 9 Okay. Thank you. Anything else, Counsel?

10:33:57 10 MR. WADE: No, Your Honor. Thank you.

10:33:58 11 THE COURT: Anything from the people on the  
10:34:02 12 phone? Hello? Are you there? Did we lose them?

10:34:11 13 MR. LYNK: Sorry. I was muted. But nothing  
10:34:14 14 from the United States, Your Honor.

10:34:14 15 THE COURT: You may -- and I'm not telling you  
10:34:16 16 to do so. But you may want to respond to Texas's letter,  
10:34:23 17 if you wish, because it's now kind of *ex parte*. But you  
10:34:29 18 also may want to wait and see if they request it.

10:34:34 19 Generally -- but that's up to you. I'm not  
10:34:41 20 telling you to do it or not to do it.

10:34:45 21 MR. LYNK: Understood, Your Honor.

10:34:45 22 THE COURT: Okay. You do whatever you want to  
10:34:47 23 do. But I want this transcript to go up. And if Texas  
10:34:53 24 for some reason is unable to do it or didn't do it or  
10:34:56 25 doesn't do it, I want the United States to send this

10:34:59 1 transcript up. Somebody send the transcript up to the  
10:35:04 2 Fifth Circuit.

10:35:04 3 MR. WALTERS: We'd be happy to do it,  
10:35:06 4 Your Honor.

10:35:07 5 THE COURT: If you say you will, you will. I  
10:35:09 6 don't have any concerns about that.

10:35:12 7 MR. WALTERS: And, Your Honor, would you like  
10:35:16 8 us to file the -- once we get a rough transcript, or  
10:35:19 9 would you like to wait until you get a final transcript.

10:35:22 10 THE COURT: She'll get a finalized transcript  
10:35:25 11 to you today.

10:35:26 12 MR. WALTERS: For today's hearing?

10:35:27 13 THE COURT: She's really good. She's an  
10:35:29 14 excellent reporter.

10:35:30 15 MR. WALTERS: That is what I've heard. Thank  
10:35:32 16 you very much. That's been our experience.

10:35:38 17 THE COURT: Anything else? You're chatting  
10:35:39 18 among yourselves.

10:35:40 19 MR. WALTERS: No, Your Honor. We're good.

10:35:42 20 THE COURT: This is the kind of chatter we get,  
10:35:44 21 you know. For all we know, somebody in the Fifth  
10:35:47 22 Circuit -- in the Attorney General's Office, some  
10:35:50 23 appellate lawyer, might have looked at this and said,  
10:35:53 24 Whoops. We have an issue here. I think we've got a  
10:35:56 25 winner, but we need to address it when it comes down to

10:36:01 1 the opinions. Some appellate lawyer might have said  
10:36:05 2 that. And, if they did, they're smart.

10:36:07 3 Okay. Thank you very much. Court stands in  
10:36:09 4 recess.

10:36:10 5 (End of transcript)

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1 **UNITED STATES DISTRICT COURT** )

2 **WESTERN DISTRICT OF TEXAS** )

3 I, Arlinda Rodriguez, Official Court Reporter, United  
4 States District Court, Western District of Texas, do certify  
5 that the foregoing is a correct transcript from the record of  
6 proceedings in the above-entitled matter.

7 I certify that the transcript fees and format comply with  
8 those prescribed by the Court and Judicial Conference of the  
9 United States.

10 WITNESS MY OFFICIAL HAND this the 7th day of August 2024.

11

12 /S/ Arlinda Rodriguez  
13 Arlinda Rodriguez, Texas CSR 7753  
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